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4 CELA

5 FIRST GENERAL COUNSEL'S REPORT

6
7 MUR: 6037

8 DATE COMPLAINT FILED: 7/10/08

9 DATE SUPPLEMENT FILED: 7/16/2008

10 DATE OF NOTIFICATION: 7/17/08

11 LAST RESPONSE RECEIVED: 9/08/08

12 DATE ACTIVATED: 9/30/08

13
14 STATUTE OF LIMITATIONS: 7/01/13-
15 8/05/13

16
17 COMPLAINANT:

Brooks Kochvar

18
19 RESPONDENTS:

20 Jeff Merkley for Oregon and Kevin Neely,
21 in his official capacity as treasurer
22 Jeff Merkley
23 Democratic Party of Oregon and Laura Calvo,
24 in her official capacity as treasurer¹
25 Democratic Senatorial Campaign Committee
26 and John B. Poersch, Jr., in his official
27 capacity as treasurer

28 RELEVANT STATUTES
29 AND REGULATIONS:

30 2 U.S.C. § 441a(a)(7)(B)(i)
31 2 U.S.C. § 441d
32 11 C.F.R. § 109.37
33 11 C.F.R. § 100.22
34 11 C.F.R. § 100.26
35 11 C.F.R. § 109.20(b)
36 11 C.F.R. § 100.52

37 INTERNAL REPORTS CHECKED:

Disclosure Reports

38 FEDERAL AGENCIES CHECKED:

None

¹ Michael Radway was the treasurer of the Democratic Party of Oregon ("DPO") at the time of the activity at issue. On January 23, 2009, the DPO filed with the Commission an amended Statement of Organization that identified Laura Calvo as the treasurer. There is no information to suggest that Mr. Radway should be named in his personal capacity as treasurer in this matter.

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I. INTRODUCTION

The Friends of Gordon Smith through its campaign manager Brooks Kochvar allege that Jeff Merkley ("Merkley" or "the candidate") and Jeff Merkley for Oregon ("MFO") accepted an excessive in-kind contribution from the Democratic Party of Oregon ("DPO") and the Democratic Senatorial Campaign Committee ("DSCC"), (hereinafter, collectively the "Respondents") in the form of two coordinated television advertisements that featured footage of Merkley and that aired in Oregon where Merkley was a candidate for the U.S. Senate. The original Complaint referenced one television advertisement and a supplement to the Complaint referenced a second advertisement. The Complaint further alleges that Respondents may have impermissibly used nonfederal funds to pay for the advertisements, the advertisements lacked the appropriate disclaimer and that Respondents failed to disclose the payments for the advertisements. Finally, the Complaint claims that Respondents committed all of these violations knowingly and willfully. In a joint response, Respondents addressed both advertisements. Respondents deny the allegations, and insist that DPO used federal funds to pay for the ads. Respondents emphasize that the advertisements did not meet the content standard for coordinated communications because they did not republish campaign materials, aired outside the 90 day period prior to the general election, and did not contain express advocacy. See 11 C.F.R. § 109.37(a)(2). Respondents further assert that since the advertisements were not coordinated communications, but instead were political party issue advertisements not subject to the disclaimer provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), the ads' disclaimers were correct. Finally, Respondents seek dismissal of the Complaint.

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1 Based upon the Complaint and Response, we gave Merkley and MFO the
2 opportunity to further respond regarding their participation in and/or authorization of
3 both advertisements. Merkley and MFO submitted no further response. Considering the
4 available information, it appears that the advertisements in question did not meet the
5 content standard for "coordinated communications," and thus did not constitute in-kind
6 contributions that were made and accepted, respectively, but not reported by
7 Respondents. However, because there is information to suggest that the advertisements
8 were authorized by Merkley, but state that they were not authorized by any candidate,
9 there is sufficient information to find reason to believe that DPO violated 2 U.S.C.
10 § 441d. Accordingly, we recommend that the Commission find no reason to believe that
11 Respondents violated the Act in this matter as to the alleged making and acceptance of
12 in-kind contributions, the failure to report them, and the alleged prohibited use of
13 nonfederal funds by a state party to pay for federal election activity. We further
14 recommend that the Commission find reason to believe that Respondents Democratic
15 Party of Oregon and Laura Calvo, in her official capacity as treasurer, violated the Act by
16 failing to include the appropriate disclaimer authorization statement in both
17 advertisements.

18 **II. FACTUAL AND LEGAL ANALYSIS**

19 **A. FACTUAL BACKGROUND**

20 **1. MFO's website posting and press release and DPO's "Respect"**
21 **advertisement**
22

23 Jeff Merkley was a candidate in the 2008 race for U.S. Senator for Oregon. In
24 November of 2007, his campaign website, www.jeffmerkley.com, posted a narrative
25 entitled "Honoring America's Veterans." The narrative highlighted Merkley's leadership

1 on veterans issues as Speaker of the Oregon House of Representatives and listed several
2 areas where the federal government "must do more" to support veterans -- including
3 healthcare and educational opportunities. See Complaint at Attachment B. Merkley won
4 the Democratic primary election held on May 20, 2008.

5 On July 1, 2008, the Democratic Party of Oregon began airing in major media
6 markets throughout Oregon a 30-second television ad entitled "Respect." The
7 advertisement continued to air through August 5, 2008, 91 days before the general
8 election. The ad featured Jeff Merkley speaking directly to the viewer with the following
9 audio and visual:

Audio	Visual
MERKLEY: Something is seriously wrong in Washington, DC	Picture: Daytime picture of the U.S. Capitol with the American Flag flying in the center of the frame
when Congress votes to raise their own pay and cut taxes for millionaires.	Picture: Newspaper caption, "Congress eyes pay raise for itself" MCCLATCHY NEWSPAPER, July 30, 2007
Then sends American troops to war in Iraq	Picture: Soldiers in combat uniforms boarding military plane
but denies them a tax deduction for the combat pay,	Picture: IRS Form 1040 Text: Senate Vote #344, November 17, 2005
and cuts their healthcare when they return home.	Picture: A corridor with the caption Text: "Health Plans for Vets Called Inadequate," THE OREGONIAN, February 8, 2008
I'm Jeff Merkley and our troops have done everything we ask with distinction. We need to start giving them the respect they deserve.	Picture: State Representative Merkley speaking to the camera Text: Jeff Merkley Picture: Merkley standing amongst four men, one individual wearing a military hat
Announcer: The Democratic Party of Oregon is responsible	Text: "Call Congress and Tell Them to Respect our Veterans" 202-224-3121

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Audio	Visual
for the content of this advertising.	PAID FOR BY THE DEMOCRATIC PARTY OF OREGON. <u>WWW.DPO.ORG</u> . NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE. DEMOCRATIC PARTY OF OREGON IS RESPONSIBLE FOR THE CONTENT OF THIS ADVERTISEMENT.

Complaint at Attachment A.

Meanwhile, on July 3, 2008, MFO issued a press release entitled, "On the 4th of July Merkley says it's Time to Give Troops Respect They Deserve." The release included the following language:

These men and woman have done everything we ask of them and deserve our undying respect. While we have delivered for veterans here in Oregon, politicians in Washington, DC have denied our troops a tax deduction for their combat pay and proper healthcare when they return home. It's time to give our troops the respect they deserve.

Complaint at Attachment C.

2. MFO's press release and DPO's "Back to Basics" advertisement

On July 2, 2008, MFO issued a press release entitled "Merkley Unveils Plan to Protect Children and Families from Violent Crime." The release relayed Merkley's state legislative record including the passing of "the nation's strictest anti-methamphetamine measure," actions which "fought to keep sex offenders away from our kids" and his intention to "champion tough new legislation to crack down on internet predators that threaten our kids." Complaint Supplement at Attachment F. Subsequently, on July 8, 2008, through August 5, 2008, DPO aired a 30-second television advertisement entitled "Back to Basics." The advertisement contained a clearly identified Merkley speaking towards the camera with the following audio and visual:

Audio	Visual
MERKLEY: Instant messaging, chat rooms, social networking sites.	Picture: Young boy in a dark room facing a computer screen Text: Instant Messaging, Chat Rooms, Social Networking
We never really know who our children are talking to. I'm Jeff Merkley, and that's why I passed one of the toughest internet predator laws in the country, and supported new laws to keep track of sex offenders. And it's why we passed our nationally-recognized law to battle the meth epidemic.	Picture: Young boy typing on keyboard, camera pans to hands typing Picture: Jeff Merkley speaking directly to the camera Picture: Jeff Merkley Text: Tough internet predator law Picture: Jeff Merkley Text: Keep track of sex offenders Picture: Jeff Merkley Text: Battle the Meth Epidemic
We need to do a better job of protecting our children.	Picture: Teenage boy and parents facing a computer
Announcer: The Democratic Party of Oregon is responsible for the content of this advertising.	Text: Call Congress and Tell Them to Protect our Children 202-224-3121 PAID FOR BY THE DEMOCRATIC PARTY OF OREGON. <u>WWW.DPO.ORG</u>. NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE. DEMOCRATIC PARTY OF OREGON IS RESPONSIBLE FOR THE CONTENT OF THIS ADVERTISEMENT.

Complaint Supplement at Attachment G.²

Based on the alleged similarity between MFO's website narrative and its press releases and the DPO's two advertisements prominently featuring Merkley, the Complaint maintains that the DPO's advertisements were coordinated communications that republished MFO campaign materials and expressly advocated for Merkley's election. According to the Complaint, the DPO's advertisements therefore constituted excessive in-kind contributions by the DPO to Merkley and MFO. The Complaint also

² The advertisements are available at <http://www.youtube.com/watch?v=W4ffWu5myK8&feature=related> ("Respect"), and <http://www.youtube.com/watch?v=Lhe1WmFmwDg> ("Back to Basics").

1 maintains that DPO may have paid for the advertisements with prohibited state account
2 funds; a supplement to the Complaint alleges that the DSCC provided DPO with the
3 funds used to pay for "Respect." Finally, the Complaint alleges that the DPO
4 advertisements contain disclaimers that do not comply with federal regulations.

5 In their joint response, Respondents maintain that the DPO advertisements do not
6 meet the content standard of the coordinated communications regulations. Response at 2.
7 First, they deny the DPO advertisements republished MFO campaign materials.
8 See 11 C.F.R. § 109.37(a)(2)(i). Rather, Respondents assert, the DPO "hired its own
9 media consultants to draft scripts, shoot footage, edit the advertisements, and place them
10 with television markets." Response at 3. Second, they contend that the DPO's
11 advertisements were issue ads, not express advocacy. See 11 C.F.R. § 109.37(a)(2)(ii).
12 Third, they point out that the advertisements aired prior to the start of the 90 day period
13 before the general election. See 11 C.F.R. § 109.37(a)(2)(iii)(A).

14 Respondents further state that DPO used federal funds to pay for the ads, and
15 appear to acknowledge that the DSCC was the source of the funds. Response at 14
16 (DSCC "transferred funds to" the DPO "in full compliance with" the Act and
17 Commission regulations). Finally, Respondents assert that the payments for the ads were
18 properly reported and that the ads' disclaimers do not violate the Act. *Id.*

19 **B. LEGAL ANALYSIS**

20
21 **1. Coordinated Communications**

22 A political party committee's communications are coordinated with a candidate, a
23 candidate's authorized committee, or agent of the candidate or committee when the
24 communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.37: (1) the
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1 communication is paid for by a political party committee or its agent; (2) the
2 communication satisfies at least one of the content standards set forth in 11 C.F.R.
3 § 109.37(a)(2); and (3) the communication satisfies at least one of the conduct standards
4 set forth in 11 C.F.R. § 109.21(d). The payment by a political party committee for a
5 communication that is coordinated with a candidate must be treated by the political party
6 committee making the payment as either an in-kind contribution to the candidate with
7 whom it was coordinated or a coordinated party expenditure. 11 C.F.R. § 109.37(b). The
8 costs of a coordinated communication must not exceed a political committee's applicable
9 contribution or expenditure limits set forth in the Act. Specifically, DPO could not
10 contribute more than \$5,000 to MFO or make over \$242,600 in coordinated party
11 expenditures on behalf of MFO. See 2 U.S.C. §§ 441a(a)(2)(A), 441a(d)(3)(A).

12 In this matter, the first prong of the coordinated communication test is satisfied
13 because DPO admits that it paid for the allegedly coordinated communications featuring
14 Merkley. See Response at 2. Accordingly, a political party committee paid for the ads.
15 See 11 C.F.R. § 109.37(a)(1). The third prong of this test, the conduct standard, also
16 appears to be satisfied because of Merkley's agreement to appear in and his substantive
17 participation in the advertisements. In explaining what actions may meet the criteria for
18 material involvement, the Commission clarified that each scenario must be considered on
19 a case-by-case basis. See Explanation and Justification, *Coordinated and Independent*
20 *Expenditures*, 68 Fed. Reg. 421, 433 (Jan. 3, 2003) ("Coordination E&J"). The
21 Commission has determined that a federal candidate's appearance in a communication
22 creates the presumption that the federal candidate was "materially involved" in the
23 content of the communication and thus may satisfy the conduct prong. See 11 C.F.R.

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1 § 109.21(d)(2)(i); Coordination E&J at 434; Advisory Opinions 2003-25 (Weinzapfel)
2 and 2004-1 (Forgy Kerr). That presumption would apply here due to Merkley's
3 substantive appearance and participation in both television advertisements, including
4 reading the DPO's scripts. *But see* MUR 6020 (Pelosi) (Commission dismissed the
5 matter wherein the candidate voluntarily appeared in communications paid for by a third-
6 party and disseminated before the primary election in which she was a candidate, because
7 neither the candidate nor the committee had any input as to when the communications
8 were disseminated and the communications' focus was a public policy issue, as opposed
9 to her candidacy);³ *see also* MUR 6147 (Kansas City Chiefs Football Club, Inc.)
10 (Commission dismissed the matter wherein the candidate appeared in a communication
11 paid for by a third-party and disseminated two days before the general election in which
12 he was a candidate, because the communication was prepared in furtherance of a tribute
13 to military personnel and did not promote or support his candidacy).

14 The content prong is satisfied where the communication at issue meets one of the
15 following content standards: a public communication that republishes, disseminates, or
16 distributes candidate campaign materials; a public communication containing express
17 advocacy; or a public communication that refers to a clearly identified federal candidate
18 that was publicly distributed or disseminated 90 days or fewer before a primary or
19 general election, and was directed to voters in the jurisdiction of the clearly identified

³ Contrary to MUR 6020, the timing of DPO's ads "Respect" and "Back to Basics" closely follow MFO's press releases and campaign website. In addition, the topics of both ads were focus areas of Merkley's campaign.

1 candidate. See 11 C.F.R. § 109.37(a)(2)(i)-(iii).⁴ The DPO's advertisements did not
2 meet any of these standards.

3 The Complaint alleges that similarities in the language used on the MFO website
4 and in MFO press releases and that used in the DPO advertisements, coupled with the
5 timing of the MFO and DPO communications, indicate the republication of Merkley
6 campaign materials. Complaint at 4; Complaint Supplement at 2. The Complaint calls
7 attention to specific phrases, as set forth below, to suggest coordination between DPO
8 and MFO.

MFO's press release 7/03/08	DPO's "Respect" advertisement
These men and woman have done everything we ask of them and deserve our undying respect.	...and our troops have done everything we ask with distinction.
denied our troops a tax deduction for their combat pay and proper healthcare when they return home	but denies them a tax deduction for the combat pay, and cuts their healthcare when they return home
It's time to give our troops the respect they deserve.	We need to start giving them the respect they deserve.

⁴ Both the "content standard prong" and the "conduct standard prong" of 11 C.F.R. § 109.37 incorporate by reference certain provisions of 11 C.F.R. § 109.21, which addresses coordinated communications made by spenders other than party committees. In *Shays v. F.E.C.* ("*Shays III*"), the U.S. District Court for the District of Columbia held that the Commission's 2006 revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. See *Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

The *Shays III* litigation did not directly involve 11 C.F.R. § 109.37, and the activity at issue in this matter occurred after the July 10, 2006 effective date of the revisions to Section 109.21. Specifically, DPO ceased airing any advertisements before the 90 day time frame set forth in the revised regulations.

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Complaint at Attachment A and C.

MFO's press release 7/02/08	DPO's "Back to Basics" advertisement
the nation's strictest anti-methamphetamine measure,	passed our nationally-recognized law to battle the meth epidemic,
fought to keep sex offenders away from our kids	...passed one of the toughest internet predator laws in the country, and supported new laws to keep track of sex offenders. And it's why we passed our nationally-recognized law to battle the meth epidemic.
champion tough new legislation to crack down on internet predators that threaten our kids.	

Complaint Supplement at Attachment F and G.

Respondents assert that the advertisements did not disseminate, distribute, or republish campaign materials because the DPO created the scripts, footage and audio contained in them. Respondents insist there is no republication when a third party creates new material that includes "an overlapping message or the appearance of a candidate." See Response at 3.

The issues addressed in Merkley's press releases and DPO's ads overlap, the time frames are consistent and the ads contain similar messages. However, the "Respect" ad contains language and phrases not included in the MFO press release such as "when Congress votes to raise their own pay and cuts taxes for millionaires," and the press release does not address Congressional pay raises or tax cuts for the wealthy. Complaint at Attachment C. The "Back to Basics" press release refers to Merkley's legislative record including efforts "making it illegal to lure children over the internet" and an effort to "expand the State DNA crime lab." Complaint Supplement at Attachment F. Again, the DPO's ad does not refer to these issues. Accordingly, although similarities exist between MFO campaign materials and the subject advertisements they do not appear to

1 rise to a level sufficient to indicate republication of campaign material. *See, e.g.,* MUR
2 2766 (Auto Dealers and Drivers for Free Trade PAC) (similar sentences used in two
3 campaigns do not rise to the level sufficient to indicate republication of campaign
4 materials because of differences in wording and phrasing).

5 Nor do the DPO advertisements expressly advocate the election or defeat of
6 Merkley or any other clearly identified federal candidate. *See* 11 C.F.R.
7 § 109.37(a)(2)(ii). Under the Commission's regulations, a communication contains
8 express advocacy when it uses phrases such as "re-elect your Congressman," "vote
9 against Old Hickory," or "Bill McKay in '94," or uses campaign slogan(s) or individual
10 word(s), which in context have no other reasonable meaning than to urge the election or
11 defeat of one or more clearly identified candidate. 11 C.F.R. § 100.22(a). The
12 Commission's regulations also provide that a communication will be considered express
13 advocacy if it contains an "electoral portion" that is "unmistakable, unambiguous, and
14 suggestive of only one meaning" and about which "reasonable minds could not differ as
15 to whether it encourages actions to elect or defeat" a candidate when taken as a whole
16 and with limited reference to external events, such as the proximity to the election.
17 11 C.F.R. § 100.22(b).

18 The advertisements do not contain phrases or individual words that promote the
19 election of Merkley; they do not contain an unmistakable electoral portion, and are
20 subject to a reasonable interpretation other than urging the election of Merkley to the U.S.
21 Senate. While Merkley is the acknowledged speaker, neither advertisement
22 acknowledges his candidacy and each advertisement is squarely focused on a specific
23 policy or legislative issue. Also, both advertisements have a specific call to action to

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1 urge Congress to take action on an issue. "Respect" asks the viewer to call Congress on
2 behalf of veteran benefits and "Back to Basics" asks viewers to call Congress regarding
3 protecting children from internet predators. *See* Complaint at Attachment A; Complaint
4 Supplement at Attachment G. Accordingly, the ads do not appear to contain express
5 advocacy under sections 100.22(a) or 100.22(b).

6 Finally, the ads were not disseminated or distributed within 90 days of the general
7 election for the U.S. Senate. *See* 11 C.F.R. § 109.37(a)(2)(iii). DPO stopped running the
8 advertisements on August 5, 2008, 91-days before the general election on November 4,
9 2008. Accordingly, the DPO advertisements do not meet any of the standards within the
10 content prong and therefore were not coordinated communications. As a result,
11 Respondents DPO and DSCC did not make and fail to report an excessive contribution to
12 MFO.

13 The Complaint also alleged that even if the advertisements were not party
14 coordinated communications under 11 C.F.R. § 109.37, the advertisements fell within the
15 general coordination provision at 11 C.F.R. § 109.20(b). Complainants argue that the
16 advertisements were "made in cooperation, consultation or concert" with Merkley and
17 therefore are in-kind contributions which must be reported by the candidate or political
18 party. *See* Complaint Supplement at 8. However, the regulation applies only to those
19 coordinated expenditures which are not made for communications. *See* Explanation and
20 Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 425 (Jan. 3,
21 2003). ("11 C.F.R. § 109.20(b) addresses expenditures that are not made for
22 communications but that are coordinated with a candidate, authorized committee or
23 political party committee."). Accordingly, section 109.20(b) is inapplicable here.

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2. DPO Funding

The Complaint alleges that DPO may have illegally funded the advertisements with corporate funds permissibly raised under state law. See 2 U.S.C. §§ 441i(b)(general prohibition on state parties spending for "federal election activity" with funds not subject to the limitations, prohibitions, and reporting requirements of the Act) and 431(20)(A)(definition of "federal election activity"). DPO's disclosed cash on hand on July 1, 2008 was \$19,713.55. DPO disclosed the receipt of transfers from the DSCC in the amounts of \$206,327 on July 3, 2008 and \$209,931.97 on July 11, 2008. Respondents assert that DSCC "transferred funds to" the DPO "in full compliance with" the Act. Response at 14. In turn, DPO disclosed payments for media buys on July 3 in the amount of \$206,327 and July 11 in the amount of \$209,931, which appear to correspond to the two television advertisements at issue. As noted, Respondents emphasize that DPO used federal funds to pay for the advertisements. Response at 14. Accordingly, it appears that DPO obtained sufficient federal funds to facilitate the DPO media buys after the DSCC transfers and, therefore, DPO utilized federal funds to pay for the advertisements. Therefore, we recommend that the Commission find no reason to believe that the Democratic Party of Oregon and Laura Calvo, in her official capacity as treasurer, violated 2 U.S.C. § 441i(b).

3. Disclaimers

Both advertisements included disclaimers stating that DPO was responsible for the advertisements, providing its email address, and advising the viewer the ads were not authorized by any candidate or candidate's committee. The Complaint alleges that the disclaimer on both advertisements violated the Act because, as coordinated

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1 communications, the disclaimers should indicate that the candidate Merkley authorized
2 the ads. See 2 U.S.C. § 441d(a). Respondents contend that because the ads were "party
3 issue advertisements not subject to the limits of § 441a(d)," the disclaimers used were
4 correct. Response at 13.⁵ Respondents further assert that only materials that are
5 distributed by a candidate or campaign or coordinated with a candidate or campaign
6 within the meaning of the regulations require a candidate authorization disclaimer. *Id.* at
7 14. Although we conclude above that the DPO advertisements do not constitute
8 coordinated communications, Merkley's appearance in the advertisements raises the issue
9 of whether he authorized the ads and if so, whether the advertisement disclaimers must
10 state that it is authorized by him and/or his authorized committee, MFO. See 2 U.S.C.
11 § 441d(a)(2).

12 Section 441d(a)(2) of the Act provides, "Whenever a political committee makes a
13 disbursement for the purpose of financing any communication through any broadcasting
14 station ... such communication -- if paid for by other persons but authorized by a
15 candidate, an authorized political committee of a candidate, or its agents, shall clearly
16 state that the communication is paid for by such other persons and authorized by such

⁵ Respondents argue that a "candidate authorization statement" is not required for "advertisements advocating a party's legislative agenda" which "should be characterized as administrative costs or generic voter drive costs." *Id.* at 14. In support of this argument, Respondents rely upon AO 1995-25 (Republican National Committee) and MUR 4476 (Wyoming State Democratic Central Committee). Both are distinguishable from the present matter. The prospective ads described in the AO were described as possibly containing "a reference to" a federal candidate, but there is no suggestion that any candidate would actually appear in the ads. In the present matter, Merkley appears in, and is the entire subject of, the DPO ads. In MUR 4476, a matter involving alleged coordinated communications, we recommended, and the Commission found, no reason to believe that respondents violated 2 U.S.C. § 441d(a). The disclaimer in the advertisement at issue only stated that the State Party had paid for it. Although respondents admitted that the State Party coordinated the ad with the candidate's campaign, the disclaimer contained no language regarding authorization or non-authorization by a candidate. The ad, however, did not contain express advocacy, and the Act at the time (pre-BCRA) required disclaimers for political committee communications only where the ad contained express advocacy. BCRA revised section 441d to require political committees to place disclaimers on public communications, see 11 C.F.R. § 110.11(a)(1), such as the DPO's ads at issue in the present matter.

1 authorized political committee." In addition, "Any [such] communication which is
2 transmitted through television shall include, in addition to the [above] requirements ... a
3 statement that identifies the candidate and states that the candidate has approved the
4 communication." 2 U.S.C. § 441d(d)(1)(B).

5 In this matter, the available information suggests that Merkley, MFO, or the
6 agents of either, may have authorized the advertisements. Respondents do not suggest
7 that Merkley was an unknowing or unwilling participant in the filming of both of the
8 DPO's advertisements. Rather, Respondents acknowledge Merkley's connection with
9 the advertisements: "Merkley was not hiding from his involvement in the
10 advertisements: His participation was evident on the face of the advertisement."
11 Response at 14. However, the response does not describe the extent to which Merkley,
12 MFO or the agents of either, viewed and/or approved the advertisements before they
13 aired. Respondents contend that DPO "hired its own media consultants to draft scripts,
14 shoot footage, edit the advertisements, and place them with the television stations."
15 Response at 3. However, this response does not get to the heart of the dispositive issue of
16 whether Merkley or his agents authorized the ads. As noted, we sent a letter to
17 Respondents' counsel seeking voluntary clarification regarding Merkley or MFO's
18 possible authorization of the ads, but we did not receive a response.

19 The DPO television ads principally feature Merkley; he is the only individual
20 addressing the viewer and the advertisements focus on his campaign themes. "Respect"
21 began airing two days before MFO's July 3, 2008 press release and contains nearly
22 identical language. *See supra* at 10 - 11. The content of "Back to Basics," consists
23 entirely of Merkley's accomplishments in the state legislature and aired only six days

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1 after MFO's July 2, 2008 press release containing similar language. The audio portion
2 stating these accomplishments is spoken by Merkley. Because of the similar themes in
3 MFO's press releases and DPO's advertisements as well as the short period of time that
4 elapsed between MFO issuing the releases and DPO airing its advertisements in local
5 media markets, it is unlikely that DPO could prepare scripts, film both ads, and edit the
6 advertisements without the cooperation of Merkley, or MFO. Considering these
7 circumstances, it is likely that Merkley, or his agents, would have at least checked the
8 script for factual accuracy before appearing in the advertisements and provided input
9 during the filming and editing process to ensure the ads highlighted Merkley's state
10 accomplishments.

11 Respondents contend that because the ads were "state party issue advertisements -
12 - not coordinated communications," they "properly used the 'not authorized by'
13 language" in the disclaimers. Response at 14. However, whether an advertisement
14 constitutes a coordinated communication does not necessarily determine the appropriate
15 disclaimer. Merkley's involvement in the ads that appears to have met the conduct
16 standard may also have constituted authorization or approval of the ads, even though the
17 time frame in which the ad aired did not suffice to meet the content standard. *See*
18 11 C.F.R. § 109.21.

19 Actions indicating authorization could include whether Merkley or his authorized
20 committee reviewed the script before filming. The application of a plain meaning of
21 "authorization" would include reviewing scripts in advance and giving approval to the
22 finished product. This conclusion is consistent with the Commission's approach in past
23 advisory opinions. *See Advisory Opinion 2004-1 (Kerr for Congress and Bush-Cheney*

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1 '04) (disclaimer by President Bush would be required in television advertisement
2 featuring Kerr and images of President Bush if agents of the President were to review the
3 final script for legal compliance, factual accuracy, quality, consistency with the
4 President's position, and any content that distracted from or distorted his "endorsement"
5 of the featured House candidate in advance of his appearance in the advertisement);
6 Advisory Opinion 2004-29 (Todd Akin for Congress) (disclaimer required for a
7 candidate appearing in advertisements regarding state ballot initiatives where the
8 candidate retained control over his appearance in the advertisements and submitted his
9 statement to the ballot initiative committee funding the advertisement or reviewed any
10 statement to be attributed to him); *cf.* Advisory Opinion 2005-18 (Reyes Committee)
11 (disclaimers not required for federal candidates featured as guests on a radio program
12 because the candidates did not have editorial control over the program, guests, or callers
13 and did not pay for or authorize the communication).

14 Recently, in MUR 6044 (Musgrove), the Commission considered whether there
15 was reason to believe that a television ad paid for by the DSCC which featured footage of
16 a federal candidate violated 2 U.S.C. § 441d because the ad's disclaimer stated that no
17 candidate authorized the ad. The television ad at issue primarily featured the candidate,
18 who participated in the filming of the ad by appearing in various locations and poses;
19 however, the candidate did not speak in the ad. The Commission exercised its
20 prosecutorial discretion, dismissed the matter, and issued a Statement of Reasons
21 ("SOR") wherein five Commissioners stated that there were insufficient grounds to
22 justify the use of additional Commission resources to investigate whether the candidate
23 authorized the ad because he did not speak in the communication, there was no

1 information to indicate that the candidate reviewed and approved the ad before it was
2 broadcast, and the ad was not coordinated. See MUR 6044 SOR by Commissioners
3 Walther, Petersen, Bauerly, Hunter, and McGahn.

4 In this matter, by contrast, not only is Merkley the dominant person visually and
5 verbally in both ads, he also directly addresses the viewer. The ad scripts were similar in
6 content and aired in corresponding time frames to Merkley's own campaign material.
7 Both of DPO's ads spotlight areas of MFO's campaign. For example, DPO's "Respect"
8 ad highlights the need for healthcare and tax reform for veterans, while MFO's campaign
9 material spotlighted Merkley's support of veterans. DPO's "Back to Basics" ad
10 specifically refers to Merkley's legislative accomplishments in passing stricter internet
11 predator laws and passing anti-methamphetamine legislation, topics also addressed by
12 MFO. These actions suggest that Merkley authorized or approved the ads and thus a
13 candidate approval statement would have been required.

14 If Merkley or MFO authorized the communications, the disclaimers would be in
15 violation of the Act. More information is needed to determine whether Merkley or his
16 agents, viewed and approved the edited advertisements before they were broadcast in
17 order to address the allegation that Respondents violated the disclaimer provisions.
18 Therefore, we recommend that the Commission find reason to believe that the
19 Democratic Party of Oregon and Laura Calvo, in her official capacity as treasurer,
20 violated 2 U.S.C. § 441d.

21 **III. INVESTIGATION**

22 This matter will require a focused investigation limited to the question of whether
23 Jeff Merkley, Merkley for Oregon, or the agents of either, authorized the DPO

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advertisements.

IV. RECOMMENDATIONS

1. Find no reason to believe that Jeff Merkley for Oregon and Kevin Neely, in his official capacity as treasurer, Jeff Merkley; Democratic Party of Oregon and Laura Calvo, in her official capacity as treasurer; or Democratic Senatorial Campaign Committee and John B. Poersch, Jr., in his official capacity as treasurer, violated the Act in connection with the alleged coordinated communications and reporting violations in this matter.
2. Find no reason to believe that the Democratic Party of Oregon and Laura Calvo, in her official capacity as treasurer, violated 2 U.S.C. § 441i(b).
3. Find reason to believe that the Democratic Party of Oregon and Laura Calvo, in her official capacity as treasurer, violated 2 U.S.C. § 441d.
4. Approve the attached Factual and Legal Analysis.

6. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel

9/17/09
Date

BY: Kathleen M. Guith
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